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FEB 27 1984
ALEXANDER L. STEVAS
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NO. 83-710

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983

HARRY J. BERKEMER, SHERIFF
OF FRANKLIN COUNTY, OHIO,
PETITIONER,

V.

RICHARD N. MCCARTY,
RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

JOINT APPENDIX

STEPHEN MICHAEL MILLER
Prosecuting Attorney of
Franklin County, Ohio

ALAN C. TRAVIS
COUNSEL OF RECORD

Assistant Prosecuting Attorney
Hall of Justice
369 South High Street
Columbus, Ohio 43215
614/462-3555

Counsel for Petitioner

R. WILLIAM MEEKS
COUNSEL OF RECORD

PAUL D. CASSIDY
CASSIDY AND MEEKS
503 South High Street
Columbus, Ohio 43215
614/228-3569

JOEL A. ROSENFELD
503 South High Street
Columbus, Ohio 43215

Counsel for Respondent

PETITION FOR CERTIORARI FILED OCTOBER 27, 1983
CERTIORARI GRANTED JANUARY 9, 1984

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[1] At the suggestion of the Clerk, a typewritten facsimile of the Joint Exhibit has been included in the Joint Appendix.

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RELEVANT DOCKET ENTRIES

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J. A. 2

State v. McCarty, No. 123,915, Franklin County Municipal Court, Joint Exhibit

CHEMICAL TEST DATA:

Specimen: ☐ Blood ☑ Breath ☐ Saliva ☐ Urine ☐ None ☐ Refused ☐ Unable	Analysis result: .00%
	If Breath, what instrument? Intoxilyzer
If refused, why?	

SUPPLEMENTAL TEST:

Advised of right to have additional test performed (Yes) No Witness U-

Was additional test performed? Yes No Unknown

INTERVIEW:

Were you operating a vehicle? Yes Where were you going? Home

What street or highway were you on? I-270 Direction of travel? EAST

Where did you start from? SR 161 What time did you start? I Don't Know

What time is it now? 01 30Am What city (county) are you in now? FRANKLIN County

What is the date? 28TH What day of the week is it? SUNDAY

INTERVIEWER TO FILL IN ACTUAL: 0225 (am)/pm Time MONDAY Day 3-31-86 Date TPC J. Williams Interviewer's Name

When did you last eat? 8:00 Pm What did you eat? Chilli

What were you doing the last three hours? VISTING FRIENDS

Have you been drinking? Yes What? 2 Beers How much? 2-Beers

Where? MORSE RD Started? 11:30 am/pm Stopped? 11:30 am/pm

Are you under the influence of an alcoholic beverage now? I guess Barely What is your occupation? FORK LIFT OPERATOR

Have you ever been stopped for OMVI before? Yes

Do you have any physical defects? NO If so, what? —

Are you ill? NO If so, what's wrong? —

Do you limp? YES Have you been injured lately? YES If so, what's wrong? HURT my BACK

Did you get a bump on the head? — Were you involved in an accident today? —

Have you had any alcoholic beverage since the accident? NO If so, what? —

Where? — How much? — When? —

Have you seen a doctor or dentist lately? NO If so, who? — When? —

What for? — Are you taking tranquilizers, pills or medicines of any kind? NO

If so, what kind? (Get sample) — Last dose? am/pm Do you have epilepsy? NO

Diabetes? — Do you take insulin? — If so, last dose? — am/pm

Have you had any injections of any other drugs recently? NO If so, what for? —

What kind of drug? — Last dose? — am/pm When did you last sleep? 8:01 Pm

How much sleep did you have? Hour Are you wearing false teeth? NO Do you have a glass eye? NO

HANDWRITING SPECIMEN
Signature and/or anything he chooses. × Richard McCarty

SUPPLEMENTARY DATA: (Note - Get witnesses, including officers who observed, to prove driving)

WITNESSES Name	Address	Tel. No.	WAS SUSPECT DRIVING OR OPERATING	WHAT WAS HIS CONDITION	WHERE OBSERVED

Passengers in Suspect's Vehicle	Name	Address	Condition

REMARKS: Def STATED THAT HE HAD SMOKED TO joints AT AROUND 11:30 Pm No Male. Drugs or PCP in Vehicle at Time RICHARD McCarty

HP-90B

STATE OF OHIO

STATE HIGHWAY PATROL

ALCOHOLIC INFLUENCE REPORT

DEPARTMENT OF HIGHWAY SAFETY

(Check)	(Check)
✓ Driver	Accident
Pedestrian	✓ Violation
Passenger	Other

Date and time of Accident or Violation 3-31-90 0120 am/pm

Case No.
Arrest No. V140153
Accident No.
Arresting Officer Tpr C J Williams
Date and time in custody 3-31-90 0120

Name Richard M McCarty Address 529 Ericksen Ave, Columbus, Ohio
Age 27 Sex M Race White Approx. Wt. 5'08" Operator Lic. No. NT825520 State Ohio

OBSERVATIONS:

CLOTHES
Describe (Type & Color) Hat or Cap NONE Shoes BOOTS
Jacket or Coat BLK Heels ½"
Shirt or Dress Mens Alloy Jersey
Pants or Skirt Blue Jeans
Condition: Disorderly Disarranged Soiled Mussed ~~Orderly~~
(Describe) Torn

BREATH
Odor of Alcoholic Beverage: strong moderate faint ✓ none

ATTITUDE
Excited Hilarious Talkative Carefree ✓ Sleepy Profanity
Combative Indifferent Insulting Cocky Cooperative ✓ Polite

UNUSUAL ACTIONS
Hiccoughing Belching Vomiting Fighting Crying Laughing

SPEECH
Not Understandable Mumbled ✓ Slurred ✓ Mush Mouthed Confused
Thick Tongued Stuttered Accent Fair Good

Indicate other unusual actions or statements, including when first observed: The Def Had To Be Held Up From Falling Down, Use The Def's Vehicle To Support Him

Signs or complaint of illness or injury: None

PERFORMANCE TESTS: (Note - See departmental instructions for conducting these tests)

Check squares if not made		Check appropriate square before word describing condition observed					
	BALANCE	✓ Falling	Needed Support	Wobbling	Swaying	Unsure	Sure
✓	WALKING	Falling	Staggering	Stumbling	Swaying	Unsure	Sure
✓	TURNING	Falling	Staggering	Hesitant	Swaying	Unsure	Sure
✓	FINGER-TO-NOSE	Right:	Completely Missed	Hesitant	Sure		
		Left:	Completely Missed	Hesitant	Sure		
✓	COINS	Unable	Fumbling	Slow	Sure	(Other)	
		(Balance during coin test)					

Ability to understand instructions: Poor ✓ Fair Good

Tests performed: Date 3-31-90 Time 0132

ARRESTING OFFICER STATEMENTS OF FACT:

VEHICLE Note any defect that may have contributed to this violation:

Effects of alcohol: extreme obvious slight ✓ none

Ability to drive: ✓ unfit fit

Did you observe the defendant drive prior to the arrest? (Yes) No If not, identify person who did:

Indicate unusual actions or statement when first observed and what led you to suspect alcoholic influence. This statement may be produced in court if you testify as a witness, as required by the Ohio Rules of Criminal Procedure:

Your Honor, This Unit was Traveling South on I-270 at MC 30 when I First Observed The Def's Vehicle. The Def's Vehicle was Observed Weaving His Lane of Travel. The Def was Followed Approx. 2 miles Before Being Stopped. As The Def was Stopped and Asked Out of The Car The Def Needed Support To Keep From Falling. The Def Stated That He Had Two Beers And Also Smoked Several Joints of Marijuana. The Def's Speech was very Slurred And Mush Mouthed And was very Hard To Understand. The Def was Place Under Arrest For OMVI And Transported To The Franklin County S.O. For A Breath Test Which He Tested .000

Rev. 3-1-89

J. A. 3

State v. McCarty, No. 123,915, Franklin County Municipal Court, Joint Exhibit
[Typewritten Facsimile]

CHEMICAL TEST DATA:

Specimen: ☐ Blood ☒ Breath ☐ Saliva ☐ Urine ☐ None ☐ Refused ☐ Unable

Analysis result: .00%

If Breath, what instrument? Intoxilyzer

If refused, why? ---

SUPPLEMENTAL TEST:

Advised of right to have additional test performed (Yes) No Witness U- ---

Was additional test performed? Yes No Unknown ---

INTERVIEW:

Were you operating a vehicle? yes Where were you going? Home

What street or highway were you on? IS-270 Direction of travel? East

Where did you start from? SR 161 What time did you start? I don't know

What time is it now? 0130 A.M. What city (county) are you in now? Franklin County

What is the date? 28th What day of the week is it? Sunday

INTERVIEWER TO FILL IN ACTUAL: 0228 (am)pm Monday 3-31-80 Tpr C.J. Williams
Time Day Date Interviewer's Name

When did you last eat? 8:00 p.m. What did you eat? Chilli

What were you doing the last three hours? Visiting Friends

Have you been drinking? Yea What? 2-Beers How much? 2-Beers

Where? Morse Rd Started? 11:30 am/pm) Stopped? 11:30 am/pm

Are you under the influence of an alcoholic beverage now? I guess barely What is your occupation? Fork Lift Operator

Have you ever been stopped for OMVI before? Yes

Do you have any physical defects? No If so, what? ---

Are you ill? No If so, what's wrong? ---

Do you limp? Yes Have you been injured lately? Yes If so, what's wrong? Hurt my back

Did you get a bump on the head? Were you involved in an accident today?

Have you had any alcoholic beverage since the accident? No If so, what? ---

Where? --- How much? --- When? ---

Have you seen a doctor or dentist lately? No If so, who? --- When? ---

What for? --- Are you taking tranquilizers, pills or medicines of any kind? No

If so, what kind? (Get sample) --- Last dose? am/pm Do you have epilepsy? No

Diabetes? --- Do you take insulin? --- If so, last dose? --- am/pm

Have you had any injections of any other drugs recently? No If so, what for? ---

What kind of drug? --- Last dose? --- am/pm When did you last sleep? 8:00 p.m.

How much sleep did you have? Hour Are you wearing false teeth? No Do you have a glass eye? No

HANDWRITING SPECIMEN Signature and/or anything he chooses.	(Signature omitted)

SUPPLEMENTARY DATA: (Note - Get witnesses, including officers who observed, to prove driving)

WITNESSES Name	Address	Tel. No.	WAS SUSPECT DRIVING OR OPERATING	WHAT WAS HIS CONDITION	WHERE OBSERVED

Passengers in Suspect's Vehicle	Name	Address	Condition

REMARKS: Def stated that he had smoked to joints at around 11:30 p.m. No angle dust or PCP in the pot

(Signature omitted)

HP-91B

STATE OF OHIO

(Check) [X] Driver [ ] Pedestrian [ ] Passenger
(Check) [ ] Accident [X] Violation [ ] Other
Date and time of Accident or Violation 3-31-80 0120 (am) pm

STATE HIGHWAY PATROL

ALCOHOLIC INFLUENCE REPORT

DEPARTMENT OF HIGHWAY SAFETY

Case No.
Arrest No. V140183
Accident No.
Arresting Officer Tpr C.J. Williams
Date and time in custody 3-31-80 01:20

Name Richard N. McCarty Address 529 Erickson Ave. Columbus, Ohio
Age 27 Sex M Race White Approx. Wt. 5'08 Operator Lic. No. NL879590 State Ohio

OBSERVATIONS:

CLOTHES	Describe (Type & Color): Hat or Cap None; Shoes Boots; (Jacket) or Coat Brn; Heels 1/2"; (Shirt) or Dress Mar Alger Davidson; (Pants) or Skirt Blue Jeans
	Condition: [ ] Disorderly [ ] Disarranged [ ] Soiled [ ] Mussed [X] Orderly (Describe) Polite
BREATH	Odor of Alcoholic Beverage: [ ] strong [ ] moderate [ ] faint [X] none
ATTITUDE	[ ] Excited [ ] Hilarious [ ] Talkative [ ] Carefree [X] Sleepy [ ] Profanity [ ] Combative [ ] Indifferent [ ] Insulting [ ] Cocky [ ] Cooperative [X] Polite
UNUSUAL ACTIONS	[ ] Hiccoughing [ ] Belching [ ] Vomiting [ ] Fighting [ ] Crying [ ] Laughing
SPEECH	[ ] Not Understandable [ ] Mumbled [X] Slurred [X] Mush Mouthed [ ] Confused [ ] Thick Tongued [ ] Stuttered [ ] Accent [ ] Fair [ ] Good

Indicate other unusual actions or statements, including when first observed: The def had to be held up from falling down, use the def's vehicle to support him

Signs or complaint of illness or injury: none

PERFORMANCE TESTS: (Note - See departmental instructions for conducting these tests)

Check squares if not made		Check appropriate square before word describing condition observed
[ ]	BALANCE	[X] Falling [ ] Needed Support [ ] Wobbling [ ] Swaying [ ] Unsure [ ] Sure
[X]	WALKING	[ ] Falling [ ] Staggering [ ] Stumbling [ ] Swaying [ ] Unsure [ ] Sure
[X]	TURNING	[ ] Falling [ ] Staggering [ ] Hesitant [ ] Swaying [ ] Unsure Sure
[X]	FINGER-TO-NOSE	Right: [ ] Completely Missed [ ] Hesitant [ ] Sure
		Left: [ ] Completely Missed [ ] Hesitant [ ] Sure
[X]	COINS	[ ] Unable [ ] Fumbling [ ] Slow [ ] Sure (Other)
		(Balance during coin test)

Ability to understand instructions: [ ] Poor [X] Fair [ ] Good

Tests performed: Date 3-31-80 Time 0132

ARRESTING OFFICER STATEMENTS OF FACT:

VEHICLE Note any defect that may have contributed to this violation:

Effects of alcohol: [ ] extreme [ ] obvious [ ] slight [X] none

Ability to drive: [X] unfit [ ] fit

Did you observe the defendant drive prior to the arrest? (Yes) No If not, identify person who did:

Indicate unusual actions or statement when first observed and what led you to suspect alcoholic influence. This statement may be produced in court if you testify as a witness, as required by the Ohio Rules of Criminal Procedure:

Your Honor: This unit was traveling south on IS270 at MP 30 when I first observed the def's vehicle. The def's vehicle was observed weaving his lane of travel. The def was followed approx. 2 miles before being stopped. As the def. was stopped and asked out of the car the def needed support to keep from falling. The def stated that he had two beers and also smoked several joints of marjuna. The def's speech was very slurred and mushmouthed and was very hard to understand The def was place under arrest for O.M.V.I. and transported to the Franklin County S.O. for a breath test which he tested .000.

IN THE COURT OF APPEALS
OF FRANKLIN COUNTY, OHIO

No. 80AP-680
March 11, 1981

State of Ohio,
Plaintiff-Appellee,
v.
Richard N. McCarty,
Defendant-Appellant.

JOURNAL ENTRY OF JUDGMENT

For the reasons stated in the decision of this court rendered herein on March 10, 1981, the assignment of error is overruled, and it is the judgment and order of this Court that the judgment of the Franklin County Municipal Court is affirmed.

WHITESIDE, REILLY & NORRIS, JJ.

By /s/ Archer E. Reilly
Judge Archer E. Reilly

cc: David E. Tingley
R. William Meeks

J. A. 5

Filed July 1, 1981

THE SUPREME COURT OF OHIO

1981 TERM

THE STATE OF OHIO,
City of Columbus.

State of Ohio,	No. 81-710
Appellee,	MOTION FOR AN ORDER
vs.	DIRECTING THE COURT OF APPEALS
Richard N. McCarty,	for FRANKLIN County
Appellant.	TO CERTIFY ITS RECORD

It is ordered by the Court that this motion is overruled.

COSTS:
Motion Fee, $20.00, paid by R. William Meeks

[Clerk's Certificate Omitted]

J. A. 6

Filed July 1, 1981
THE SUPREME COURT OF OHIO
1981 TERM

THE STATE OF OHIO,
City of Columbus.

State of Ohio,
Appellee,
vs.
Richard N. McCarty,
Appellant.

No. 81-710
APPEAL FROM THE
COURT OF APPEALS
for Franklin County

This cause, here on appeal as of right from the Court of Appeals for Franklin County, was heard in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.

It is further ordered that a copy of this entry be certified to the Court of the Court of Appeals for Franklin County for entry.

[Clerk's Certificate Omitted]

J. A. 7

No. 82-3216

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

RICHARD McCARTY,
Petitioner-Appellant,

v.

CAPTAIN HERDMAN,
Respondent-Appellee.

ON APPEAL from the United States District Court for the Southern District of Ohio.

Decided and Filed September 6, 1983.

Before: KENNEDY, MARTIN, and WELLFORD, Circuit Judges.

MARTIN, Circuit Judge, delivered the opinion of the Court, in which KENNEDY, Circuit Judge, joined. WELLFORD, Circuit Judge, (pp.7-8) delivered a separate, dissenting opinion.

BOYCE F. MARTIN, Jr., Circuit Judge. This appeal presents the sole issue of whether law enforcement officers must give "*Miranda* warnings" to individuals in custody for misdemeanor traffic offenses. *See Miranda v. Arizona*, 384 U.S. 436 (1966).

Richard McCarty appeals the denial of his petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. The petitioner was convicted of operating a motor vehicle while under the influence of alcohol and/or drugs in violation of Ohio Revised Code § 4511.19, a first degree misdemeanor. Evidence supporting his conviction included

incriminating statements which he tried unsuccessfully to suppress. He was sentenced to ninety days in jail, eighty of which were suspended. The Franklin County, Ohio Court of Appeals affirmed the conviction and the Ohio Supreme Court refused to accept jurisdiction in this matter. The district court below denied habeas relief because in its judgment, one arrested for a misdemeanor traffic offense is not constitutionally entitled to *Miranda* warnings. *See, e.g., Clay v. Riddle*, 542 F. 2d 456 (4th Cir. 1976); and *Ohio v. Pyle*, 19 Ohio St. 2d 64 (1969). McCarty appeals from that decision.

The state trooper's arrest report and the parties' stipulations comprised all the facts before the trial judge. Ohio State Trooper Williams observed McCarty's car weaving in and out of its lane while travelling south on Interstate 270 on the evening of March 31, 1980. Trooper Williams stopped the car and asked McCarty to get out. He noticed that McCarty needed support to keep from falling as he exited the vehicle. "At this time Trooper Williams concluded that the defendant would be charged with a traffic offense and, therefore, his freedom to leave the scene terminated."[1] (Joint stipulation.)

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[1] While the parties so stipulate, we do not feel bound by the subjective standard implied in the stipulation. *See* United States v. Harris, 611 F. 2d 170,172 (6th Cir. 1979).

In Lowe v. United States, 407 F. 2d 1391 (9th Cir. 1969), the court stated:

> It follows that *the time when* the officer's intent to arrest is formed has no bearing on the question of whether or not there exists "in custody" questioning. whether a person is in custody should not be determined by what the officer or the person being questioned thinks; there should be an objective standard. Although the officer may have an intent to make

McCarty had difficulty performing the field sobriety balancing test. While still at the scene of the arrest, he told Trooper Williams that he had recently consumed two beers and several joints of marijuana. McCarty's speech was very slurred and Trooper Williams had difficulty understanding him.

Trooper Williams placed McCarty under formal arrest and took him to the county jail for an intoxilyzer test. The test showed no alcohol in McCarty's system. At the jail, McCarty answered Trooper Williams' questions for the State Highway Patrol Alcohol Influence Report. McCarty responded that he was "barely" under the influence of alcohol. At Trooper Williams' request, McCarty wrote on the report that the marijuana he had smoked had not been treated with "PCP"or "angel dust." At no time, either before or after McCarty was taken into custody, did Trooper Williams advise him of his constitutional rights.

Before the trial judge, McCarty moved to exclude his statements to Trooper Williams. His motion was denied. He pleaded *nolo contendere* and was found guilty of driving while intoxicated.

---

an arrest, either formed prior to, or during the questioning, this is not a factor in determining whether there is present "in-custody" questioning. It is the officer's statements and acts, the surrounding circumstances, gauged by a "reasonable man" test, which are determinative.

Id. at 1397; *accord*, United States v. Booth, 669 F. 2d 1231, 1235 (9th Cir. 1981). *See also* Oregon v. Mathiason, 429 U.S. 492, 495 (1977).

[1] Habeas relief after a guilty plea is permissible. *See* Lefkowitz v. Newsome, 420 U.S. 283 (1975) (Justices White, Powell, Burger, and Rehnquist dissenting.)

McCarty argued consistently, at both state and federal levels [3] that *Miranda v. Arizona* requires law enforcement officers to advise all persons taken into custody of their constitutional rights to counsel and to remain silent. Because he was not so advised when arrested for drunken driving, he maintains that the statements he made while in police custody cannot support his conviction. We agree.

In *Miranda*, the Supreme Court held that an individual in police custody may not be interrogated until and unless he is first advised that he has the right to remain silent; that anything he says may be used against him; that he had the right to an attorney; and that an attorney will be appointed for him if he cannot retain one. These warnings are an "absolute prerequisite to interrogation," said the court, 384 U.S. at 467, and without the warnings, the fruits of a custodial interrogation are inadmissible at trial.

> To summarize, we hold that when an individual is taken into custody or otherwise deprived of his freedom by the authorities in any significant way and is subjected to questioning, the privilege against self-incrimination is jeopardized. Procedural safeguards must be employed to protect the privilege. . . But unless and until such warnings are demonstrated . . . , no evidence obtained as a result of interrogation can be used against him.

384 U.S. at 478-479 (footnote omitted).

Miranda, then, creates procedural safeguards to secure the fifth amendment privilege against self-incrimination. Although felony offenses were specifically in issue in *Miranda* and its companion cases, the language of the opinion does not limit the safeguards to individuals suspected of felonies. Similarly, yet more importantly, the language of the fifth amendment does not limit the privilege

against self-incrimination to those charged with felonies. It has never been suggested that a defendant charged with a misdemeanor could be compelled to testify against himself. To so argue would be both illogical and inconsistent. "[T]here can be no doubt that the Fifth Amendment privilege . . . serves to protect persons *in all settings* in which their freedom of action is curtailed in any significant way from being compelled to incriminate themselves." 384 U.S. at 467 (emphasis added). We hold that *Miranda* warnings must be given to *all* individuals prior to custodial interrogation, whether the offense investigated be a felony or a misdemeanor traffic offense.

Our reasoning here follows *Argersinger v. Hamlin*, 407 U.S. 25 (1972), which concerned the scope of the sixth amendment right to counsel. There the defendant faced potential incarceration for committing a misdemeanor. The Court held, "[a]bsent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial." *Id.* at 37. The Court relied heavily on *Gideon v. Wainwright*, 372 U.S. 335 (1964), for the proposition that all defendants, including the indigent, are entitled to counsel. Although *Gideon* involved a felony offense, the Court noted neither *Gideon* nor the sixth amendment right to counsel was limited to "serious" offenses. 407 U.S. at 30. We follow this same reasoning to extend the right to counsel to individuals charged with misdemeanors.

We recognize that the Fourth Circuit in *Clay v. Riddle*, 541 F. 2d 456 (4th Cir. 1976), declined to require *Miranda* warnings for misdemeanor traffic offenses. That court's decision seemed to turn on two factors. First, the court noted its awareness of language in *Miranda* that the *Miranda* decision was "not intended to hamper" the traditional investigative functions of the police. *Miranda*, 384

U.S. at 477, *quoted in Clay*, 541 F. 2d at 457. Second, the court emphasized that "the unlawful incident [in *Clay*] was a commonplace event — a traffic offense . . . ." *Id.* Neither of these factors convinces us that *Miranda* does not apply to traffic misdemeanors.

First, the traditional investigative police functions will not be hampered by requiring *Miranda* warnings prior to custodial interrogations in misdemeanor traffice offenses. "On-the-scene questioning," preserved by the *Miranda* Court, is likewise preserved today. To the extent that *Miranda* and its progeny permit non-custodial interrogations when a felony is investigated, our decision permits the same when a misdemeanor traffice offense is investigated. It is only when an individual "has been taken into custody or otherwise deprived of his freedom of action in any significant way," *Miranda*, 384 U.S. at 444, that warnings must be given before questioning begins. We do not hold that the mere stopping of a motor vehicle triggers *Miranda*. Because the police gather information in misdemeanor traffic offenses primarily through on-the-scene questioning, their freedom to investigate remains essentially unhampered.

Second, we attach no significance to the fact that traffic offenses are "commonplace" events. The privilege against self-incrimination is an enduring right, undiminished by the number of people who enjoy it or the frequency of its exercise. The mere fact that police officers may frequently have to advise individuals of their constitutional rights does not justify limiting these important procedural safeguards to felony cases. Furthermore, although traffic offenses may be commonplace, *custodial interrogations* stemming from misdemeanor traffic offenses are *rare*. For these reasons, we decline to adopt the Fourth Circuit's reasoning in *Clay* that *Miranda* warnings do not

apply to the present situtation because the offense is commonplace.

We believe that the facts of the present case require that Trooper Williams should have advised McCarty of his constitutional rights. At the point that Trooper Williams took McCarty to the police station, his "freedom of action [was] curtailed in [a] significant way." The failure to advise McCarty of his constitutional rights rendered at least some of his statements inadmissable. *Miranda.*

Because the petitioner was convicted on inadmissible evidence, we vacate his conviction. Accordingly, we remand the case to the district court for the issuance of a writ of habeas corpus, giving the State of Ohio ninety days in which to retry McCarty.

WELLFORD, Circuit Judge, dissenting. I agree with much of the majority opinion in this case. As I read the opinion, the majority finds that McCarty was not in custody until he was formally placed under arrest. During the original confrontation and investigation at the scene, McCarty was not significantly deprived of freedom of action, despite the stipulation that the officer knew that McCarty would be arrested as soon as he got out of his automobile. This comports with the language in *Miranda v. Arizona*, 384 U.S. 436, 477-78 (1966) stating:

> Our decision is not intended to hamper the traditional function of police officers in investigating crime. . . . General on-the-scene questioning as to facts surrounding a crime. . . is not affected by our holding. . . . In such situations the compelling atmosphere inherent in the process of in-custody interrogation is not necessarily present.

Consequently, I agree that McCarty's statements made prior to formal arrest were made in a noncustodial situation and were therefore admissable. *See, U.S. v. LeQuire*, 424 F. 2d 341, 343-344 (5th Cir. 1970).

Even if a suspected traffic offender were deemed to be "in custody" or significantly "deprived of his freedom" by the investigating officer *at the scene* of an investigation for a misdemeanor offense, (and McCarty was here charged with a first degree misdemeanor under Ohio law), I would hold that any admission or confession made under such circumstances to be admissable without a *Miranda* warning. *See, Clay v. Riddle*, 541 F. 2d 456 (4th Cir. 1976).

I agree with the majority, however, that the later questioning after formal arrest at the police station was subject to *Miranda, supra*, since this was clearly a custodial situation. *Argersinger v. Hamlin*, 407 U.S. 25 (1972), holds that a defendant charged with a misdemeanor, even a traffic offense, must have counsel if he is to be sentenced to jail, but the right to counsel would not apply as a constitutional requirement if an offender were deprived of his automobile license or fined in a misdemeanor proceeding. Application of this rationale to admission of evidence without a *Miranda* warning in this "first degree misdemeanor" situation compels the conclusion that *Miranda* warnings are only required in a *clearly* custodial situation, as where a formal arrest is made. McCarty's confessions at the police station, therefore, if material, since they came after arrest and formal charges, would be inadmissible.

The later confessions, however, merely reiterate what McCarty had already admitted at the scene to the investigating officer. Failure to suppress what was essentially repetitious confession evidence, which should not have been admitted on the basis of failure to give *Miranda* warnings at the jail, was harmless error under the circumstances.

Chapman v. California, 386 U.S. 18 (1967). I would therefore affirm the district court's denial of habeas corpus relief.

J. A. 16

Filed October 3, 1983
Clerk's Stamp Deleted

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
NO. 82-3216

RICHARD McCARTY,

Petitioner-Appellant,

vs.

HARRY J. BERKEMER, SHERIFF,

Respondent-Appellee

ORDER STAYING MANDATE

ORDERED, That motion to stay mandate herein pending application to the Supreme Court for writ of certiorari is hereby granted and the mandate is stayed for thirty days from this date; provided that, if within such thirty days, the applicant shall file with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition, record, and brief have been filed, the stay shall continue until the final disposition of the case by the Supreme Court. Unless this condition is complied with within such thirty days or any extension thereof made by the Court or any judge thereof, or if the condition is complied with, then upon the filing of copy of an order denying the writ applied for, the mandate shall issue.

ENTERED BY ORDER OF THE COURT
/s/JOHN P. HEHMAN, CLERK

CERTIFICATE OF SERVICE

Pursuant to Rule 28.5 (b) of the Rules of the Supreme Court, I hereby certify that the requisite number of copies (3) of the foregoing Joint Appendix have been served upon respondent, Richard N. McCarty, by personal service of such copies to the office of respondent's counsel of record, R. William Meeks, 503 South High Street, Columbus, Ohio, 43215, by delivery to counsel for respondent, or to an employee thereof, this____day of February, 1984.

I further certify that all parties required to be served have been served. The respondent's name is Richard N. McCarty, and his address is 529 Erickson, Columbus, Ohio 43213.

_____

ALAN C. TRAVIS
Counsel of Record
for Petitioner